BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

To: The Commission

REPLY COMMENTS OF UNITED STATES SATELLITE BROADCASTING COMPANY, INC.

United States Satellite Broadcasting Company, Inc. ("USSB"), by its attorneys, hereby submits its Reply Comments in the above-captioned proceeding.

I. Introduction and Summary

As stated in its Comments in this proceeding, USSB supports the use of DBS to provide non-commercial informational and educational programming. Indeed, USSB has recognized from its initial planning that the provision of such programming would not only serve the public interest, but would also increase the audience for and further the development of DBS service. Thus,

financial and administrative requirements, that potential DBS providers forego initiation of service, or that the development of the service is hampered or crushed. The Commission has recognized this need to balance public interest requirements with a flexible developmental environment, both in the Notice of Proposed Rulemaking in this proceeding,[1] and in its initial authorization of DBS service.[2]

While the Commission must enact regulations required by Section 25 of the 1992 Cable Act, USSB notes that the overriding and primary intent of that Act was to protect consumers from unreasonable prices by promoting the growth of entities that would compete with cable TV MSOs.[3] It certainly was not Congress' intent to so burden DBS providers as to crush this potential major

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[1] E.g., at paragraphs 29, 35, 40 and 49.

[2] Direct Broadcast Satellites, Report and Order, 90 FCC 2d 676,707 (1982). The substantial financial, marketing and technical obstacles still to be overcome in establishing a viable DBS service are demonstrated by the fact that, while the Commission authorized DBS service in 1982, there are still no providers today, although USSB plans to commence service in March of 1994.

[3] See Sections 2(a)(1), 2(a)(2) and 2(b) of the Act; See also House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 26 (1992):

> H.R. 4850 is designed to address the principal concerns about the performance of the cable industry and the development of the market for video programming since passage of the [1984] Cable Act. This legislation will protect consumers by preventing unreasonable rates ... and by sparking the development of a competitive marketplace.

competitor.[4] The Commission must take this principle into account when enacting DBS regulations.

Although most commenters in this proceeding took a realistic view of the need to balance obligations and burdens, a few commenters suggested that the Commission enact requirements substantially more burdensome than those authorized, or even suggested, in the 1992 Cable Act. The Commission must remain cognizant that these attempts to fleece the perceived DBS "golden goose" could in fact result in killing it, and we would lose a medium that can be expected to provide unique service to all Americans, as well as present a substantial competitor to cable operators.

II. The Commenters Have Not Demonstrated That The Use of DBS to Provide Local Service is Spectrum Efficient or Currently Technologically Feasible.

Section 25(a) of the 1992 Cable Act requires the Commission to examine the opportunities that the establishment of DBS provides for the principle of localism. In the Notice, the Commission notes that DBS was established because its technology could provide a unique service to large land areas in a manner that does not fit the model of traditional local broadcasters. Notice at para. 33. The Commission also noted that the D.C. Circuit has recognized that DBS is "inherently unsuitable" economically and technologically to

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[4] Even the Consumer Federation of America ("CFA") has recognized the need to ensure that public interest requirement do not jeopardize the viability of DBS as a significant competitor against cable TV MSOs. CFA Comments at page 9.

provide local broadcast service. Id. Nevertheless, the Commission fulfilled its obligation by enquiring whether recent changes in technology have altered the validity of this conclusion. The DBS providers, the parties with the greatest knowledge of the parameters of current technology, replied with the facts -- DBS cannot currently be offered on a local basis in an efficient,

which extend far beyond anything even remotely imagined by the Act or the Notice. Not only does NATOA believe that the Act mandates the imposition of local video programming requirements on DBS (NATOA Comments at page 7), NATOA believes that Section 25 of the Cable Act provides a basis for imposing local non-video requirements on DBS providers, and for requiring DBS providers to give 5 percent of their gross revenues to local programmers. NATOA Comments pages 9-12. NATOA's suggestions are based on two fundamental errors.

First, the Cable Act does not mandate that the Commission impose local video programming requirements on DBS providers. Section 25(a) only requires the Commission to "examine" the "opportunities" that DBS provides for the principle of localism, and to examine the "methods by which such principles may be served ..." (emphasis added). Second, NATOA's proposal is based on the principle that DBS should be required to have the same obligations which have been placed on the established cable television providers, in order to "ensure that DBS services compete on a level playing field with cable operators." NATOA Comments at note 6. This turns the core purpose of the 1992 Cable Act on its head: the overriding and primary intent of that Act was to protect consumers from unreasonable prices by promoting the growth of entities, such as DBS operators, that would compete with cable TV MSOs. See note 3, supra.

The errors in NATOA's proposals go beyond fundamental principles, however. For example, while NATOA generally asserts that technological barriers should not limit the obligation to provide local programming, it also admits that technology may in fact expand the "local" service area into statewide or "regional" areas. NATOA Comments at page 7. NATOA provides no showing, however, that "regional" programming would be responsive to the principle of localism referred to in the Act. Furthermore, NATOA makes no showing of any compelling need or market for "regional" programming, as opposed to local programming currently delivered by broadcasters and cable operators, and national programming delivered by network broadcast affiliates and cable networks.[5]

NATOA also suggests that the Commission should impose local non-video requirements, such as the provision of teletext, on DBS operators. Comments at page 11. NATOA fails to provide any basis in the Act for such a requirement. Furthermore, NATOA provides no showing of a compelling need for a DBS-delivered teletext network. The "blue-sky" predictions for the growth of teletext services have not been fulfilled, and to the extent that a market exists for such services, they are and can be easily delivered by wireline common carriers and cable TV operators.

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[5] Similarly, NATOA asserts that some of the channel space required to be allotted for noncommercial programming requirements must be given to local educational programmers. NATOA makes no showing that there is a compelling need for regional educational programming delivered by DBS, in addition to local programming provided by local noncommercial broadcasters, ITFS operators, and PEG channels on local cable systems.

Lastly, NATOA suggests that DBS operators should be obligated to provide 5 percent of their gross profits to local programmers, to offset the cost of producing programming. Comments at page 10. There is absolutely no basis in the Act or its legislative history for imposing such a burden on DBS operators. To the extent that NATOA attempts to justify this proposal as a means of hobbling DBS, this again turns the Cable Act on its head, as was discussed

inconsistent with the Act, as well as with the technology and history of DBS, it is remarkably short-sighted: it will substantially damage the ability of DBS operators to provide a

among non-commercial educational programmers, or to choose the channel placement or broadcast time for non-commercial programming. And while DBS operators are not identical to broadcasters, there is no basis for distinguishing away the broad editorial discretion retained by broadcasters under the First Amendment. Thus, even under the Fairness Doctrine, broadcasters retained a substantial amount of editorial control, and no particular private individual or institution had an indefeasible right to access. CBS v. Democratic National Committee, 412 U.S. 94, 110-113 (1973).

Accordingly, comments regarding the allocation of channel space among eligible non-commercial programmers that suggest use of a lottery[7], or a first-come, first-served procedure[8], are clearly inconsistent with the DBS operator's editorial discretion. Such

A requirement to place all non-commercial programming on a discrete channel is also inconsistent with the flexible regulatory approach recognized by the Commission as necessary to nurture this nascent service. USSB recognizes that it is in its own best interest, as well as in the interest of non-commercial programmers, to build a loyal and regular audience for non-commercial programming on DBS. Easy access to such programming is obviously important to building an audience, but easy access may be achieved by use of menus, rather than selection of a particular channel. In this case, there would be no need for placement on a discrete channel. See Comments of The Association of America's Public Television Stations ("APTS") at pages 17-18.

Lastly, in its initial Comments, USSB urged the Commission to allow DBS providers to use their discretion in evaluating what programming qualifies as "noncommercial educational or informational programming." Commenters such as APTS agreed that a definition of such programming is not necessary. Comments of APTS at page 25. See also Comments of CFA at page 18. On the other hand, HITN not only seeks to define such programming, it suggests that the definition should be limited to formal educational programming offered from accredited schools, and suggests that programming from institutions such as the Public Broadcasting System should be excluded since it is not "educational." Comments of HITN at pages 16-17. While its proposal would certainly benefit HITN, it clearly contradicts the language and intent of the Act.

Even if HITN's assertion regarding PBS programming were true, the Act requires the allocation of channel space to programming of an "educational or informational" nature. Clearly programmers other than HITN's ITFS licensees produce noncommercial informational programming of great value.

IV. Conclusion

USSB looks forward to presenting noncommercial educational and informational programming on its DBS service. The Commission has correctly recognized, however, that the regulatory requirements to do so must be flexible enough to promote, rather than crush, the growth of this nascent service. Furthermore, such requirements must not improperly abrogate the DBS licensees editorial discretion.

CERTIFICATE OF SERVICE

I, Inder M. Kashyap, an employee of the law firm of Fletcher, Heald & Hildreth, do hereby certify that true and correct copies of the foregoing "REPLY COMMENTS OF UNITED STATES SATELLITE BROADCASTING COMPANY, INC." were sent by 1st Class U.S. mail, postage prepaid, on the 14th day of July, 1993, to the following:

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